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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
7 IN AND FOR KING COUNTY

8 STATE OF WASHINGTON,

9 Plaintiff,

10 vs.

11 PUAU TAGALOA,

Defendant.

No. 04-1-03162-8 SEA

MEMORANDUM OPINION RE:  
JUVENILE ADJUDICATION OFFENDER  
SCORE

12 Mr. Tagaloa comes before this court contesting the inclusion of a juvenile adjudication in  
13 his offender score for purposes of sentencing. Defendant claims including that adjudication to  
14 increase the sentencing range does not fall within the *Apprendi* exception and is in violation of  
15 *Blakely*. Accordingly, the issue presented is whether his juvenile adjudication may be  
16 considered by an adult court for sentencing purposes, following U.S. Supreme Court rulings in  
17 *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000) and *Blakely v. Washington*,  
18 --- U.S. ---, 124 S.Ct. 2531, 2536, 159 L.Ed.2d 403 (2004). Under the Sentencing Reform Act  
19 of 1981, as amended, juvenile convictions are included in a defendant's criminal history. See  
20 RCW 9.94A.030(13) ("Criminal history" means the list of a defendant's prior convictions and  
21 juvenile adjudications, whether in this state, in federal court, or elsewhere.)

22 The question before this Court is whether a prior juvenile adjudication, without jury,  
23 qualifies as a "prior conviction" for purposes of the *Apprendi* exception. *Apprendi v. New*  
MEMORANDUM OPINION RE: JUVENILE ADJUDICATION  
OFFENDER SCORE - 1

John P. Erlick, Judge  
King County Superior Court  
516 Third Avenue  
Seattle WA 98104  
(206) 296-9345

1 *Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000). In *Apprendi*, the United States Supreme Court  
2 held that a fact that "increases the penalty for a crime beyond the prescribed statutory  
3 maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at  
4 490, 120 S.Ct. 2348. The Court, however, provided the following well-noted exception: a fact of  
5 a prior conviction can be used to increase the penalty for a crime beyond the prescribed  
6 statutory maximum even if it is not submitted to the jury and proved beyond a reasonable  
7 doubt. *Id.*; see also *Jones*, 526 U.S. at 243, n. 6, 119 S.Ct. 1215. Thus, prior convictions are  
8 exempt from *Apprendi*'s general rule.

9 In *Jones v. United States*, the Court explained the prior-conviction exception: "One  
10 basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike  
11 virtually any other consideration used to enlarge the possible penalty for an offense ... *a prior*  
12 *conviction must itself have been established through procedures satisfying the fair notice,*  
13 *reasonable doubt and jury trial guarantees.* *Jones v. United States*, 526 U.S. 227, 249, 119  
14 S.Ct. 1215 (1999) (emphasis added). See also *Almendarez-Torres v. United States*, 523 U.S.  
15 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) (upholding federal law allowing enhanced  
16 sentence based on prior convictions not alleged in the indictment).

17 In *United States v. Tighe*, 266 F.3d 1187, 1193 (9th Cir.2001), the United States Court  
18 of Appeals for the Ninth Circuit considered whether: "prior juvenile adjudications, which do not  
19 afford the right to a jury trial, fall within the 'prior conviction' exception to *Apprendi*'s general  
20 rule that a fact used to increase a defendant's maximum penalty must be submitted to a jury  
21 and proved beyond a reasonable doubt?" 266 F.3d at 1193. The majority of the panel  
22 answered the question in the negative, holding that the prior conviction exception to  
23 *Apprendi*'s general rule must be limited to prior convictions that were themselves obtained

1 through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.  
2 *Id.* at 1194. The court recognized that at "first blush" it would appear that a juvenile  
3 adjudication would fit within *Apprendi*'s exception. However, upon closer examination, the  
4 majority concluded that appearance dissipates when considering the constitutional differences  
5 between adult and juvenile convictions, such as the lack of a right to jury trials in most juvenile  
6 cases. *Id.* at 1192-93.

7 The court considered, *inter alia*, the scope of the term "conviction" as used by the  
8 Supreme Court in *Apprendi* and the cases leading up to *Apprendi*. *Id.* at 1193. Specifically, it  
9 focused on two passages from *Jones* and *Apprendi* in which the Supreme Court explained why  
10 prior convictions differ from other sentencing enhancements, a predecessor to *Apprendi*, which  
11 stated:

12 One basis for that constitutional distinctiveness [of prior convictions] is not hard  
13 to see: unlike virtually any other consideration used to enlarge the possible  
14 penalty for an offense ... *a prior conviction itself must itself have been established*  
*through procedures satisfying the fair notice, reasonable doubt and jury trial*  
*guarantees.*

15 *Tighe*, 266 F.3d at 1193-94 (quoting *Jones*, 526 U.S. at 249, 119 S.Ct. 1215). And:

16 There is a vast difference between accepting the validity of a prior judgment of  
17 conviction entered in a proceeding in which the defendant had the right to a jury  
18 trial and the right to require the prosecutor to prove guilt beyond a reasonable  
doubt, and allowing the judge to find the required fact under a lesser standard of  
proof.

19 *266 F.3d.* at 1194 (quoting *Apprendi*, 530 U.S. at 496, 120 S.Ct. 2348). Based on these two  
20 passages, the *Tighe* court decided that juvenile adjudications that do not afford the right to a  
21 jury trial and require a beyond-a-reasonable-doubt burden of proof do not fit within *Apprendi*'s  
22 exception for prior convictions.

1 The courts of this State have long recognized the distinction between adult prosecutions  
2 and juvenile adjudications. In *State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987), our  
3 Supreme Court noted that jury trials are *not* required or guaranteed because:

4 Juvenile proceedings remain rehabilitative in nature and distinguishable from  
5 adult criminal prosecutions. Thus, no right to trial by jury attaches.  
6 The sixth amendment to the United States Constitution provides that "[i]n all  
7 *criminal prosecutions*, the accused shall enjoy the right to a speedy and public  
8 trial, by an impartial jury ..." (Italics ours.) Similarly, article 1, section 22 of the  
9 Washington State Constitution provides that "[i]n *criminal prosecutions* the  
10 accused shall have the right ... to have a speedy public trial by an impartial jury  
11 ..." (Italics in original.)

12 This court and the Legislature have previously declined to recognize juvenile  
13 proceedings as criminal prosecutions that entitle an accused to a jury trial.

14 *Id.* at 4-5. Thus, the Court recognized not only the distinction in the goal of juvenile  
15 adjudications, but also in the procedure:

16 We concluded that while juvenile proceedings had to comply with "rules of  
17 fairness and basic procedural rights", such compliance was possible without the  
18 formality of a jury trial. "One of the substantial benefits of the juvenile process is a  
19 private, informal hearing conducted outside the presence of a jury."

20 *Id.*

21 This concept of a less formal, less adversarial proceeding is a longstanding one and  
22 was recognized by the United States Supreme Court in *McKeiver v. Pennsylvania*, 403 U.S.  
23 528, 91 S.Ct. 1976 (1971):

There is a possibility, at least, that the jury trial, if required as a matter of  
constitutional precept, will remake the juvenile proceeding into a fully adversary  
process and will put an effective end to what has been the idealistic prospect of  
an intimate, informal protective proceeding.

Justice White, in his concurring opinion, concluded that jury trial were not constitutionally  
required in juvenile adjudications because the Court had not "considered the juvenile case a  
criminal proceeding within the meaning of the Sixth Amendment and hence automatically

1 subject to all of the restrictions normally applicable in criminal cases.” On the one hand, he  
2 recognized that “[a]lthough the function of the jury is to find facts, that body is not necessarily  
3 or even probably better at the job than the conscientious judge.” However, he cautioned that  
4 when criminal punishment is at stake,” the consequences of criminal guilt are so severe that  
5 the Constitution mandates a jury to prevent abuses of official power.” *McKeiver*, 403 U.S. at  
6 552-553. Justice White explained the distinction between juvenile adjudications and criminal  
7 proceedings:

8 For the most part, the juvenile justice system rests on more deterministic  
9 assumptions. Reprehensible acts by juveniles are not deemed the consequence  
10 of mature and malevolent choice but of environmental pressures (or lack of them)  
11 or of other forces beyond their control. Hence the state legislative judgment not  
12 to stigmatize the juvenile delinquent by branding him a criminal; his conduct is  
13 not deemed so blameworthy that punishment is required to deter him or others...  
Not only are those risks that mandate juries in criminal cases of lesser magnitude  
in juvenile court adjudications, but the consequences of adjudication are less  
severe than those flowing from verdicts of criminal guilt. This is plainly so in  
theory, and in practice there remains a substantial gulf between criminal guilt and  
delinquency, whatever the failings of the juvenile court in practice may be.

14 403 U.S. at 552-553.

15 Similar notions remain to this date. See, e.g., *State v. J.H.*, 96 Wash.App. 167, 171 ,978  
16 P.2d 1121, 1123 (1999) (1997 amendments to Juvenile Justice Code did not render juvenile  
17 proceedings so much less rehabilitative and more punitive as to require jury trial). However  
18 laudable the goals and intent of our juvenile justice system, the State can not have it both  
19 ways. On the one hand, it can not offer the perhaps commendable goal of “a private, informal  
20 hearing conducted outside the presence of a jury”, and, on the other hand, apply the fruits of  
21 that informal proceeding, without the benefit of a jury and a “fully adversarial process” for  
22 purposes of calculating an adult offender score. The additional points included in such a  
23

1 calculation is additional *punishment*, without the benefit of a jury factual determination.<sup>1</sup> This  
2 tension is well demonstrated by the dueling legislative directives in R.C.W.13.04.240 ("An  
3 order of court adjudging a child delinquent or dependent under the provisions of this chapter  
4 shall in no case be deemed a conviction of crime.") with that set forth in R.C. W. 13.04.011  
5 ("Adjudication" has the same meaning as "conviction" in RCW 9.94A.030, and the terms must  
6 be construed identically and used interchangeably.")

7 In its recent decision in *State v. Jones*, \_\_Wn.App. \_\_\_, 107 P.3d 755(2005), the Court  
8 of Appeals underscored the critical nature of ensuring that the procedural protections of  
9 *Apprendi* and *Blakely* "afforded by the Sixth Amendment apply to factual determinations that  
10 may increase a sentence." *Id.*, at 760.. The Court held that "[n]o such safeguards exist here  
11 for the determination of whether the defendants were on community placement at the times of  
12 their offenses" (where the judge made the factual determination.) *Id.* Citing to a recent Division  
13 III case, the *Jones* court noted that that the court recognized that "the determination of 'facts  
14 of a prior conviction that are not specified in the indictment, judgment, jury instructions, or  
15 verdict' do not bear the same procedural protections as facts necessarily determined by the  
16 jury's verdict." *Jones*, 107 P.3d, at 760, citing *State v. Ortega*, 120 Wash. App. 165 (2004).  
17 Citing *Apprendi*, the *Ortega* court held that "When the jury is not charged with the duty to  
18 determine that certain facts exist beyond a reasonable doubt, those facts cannot be used to  
19 increase the penalty for the related crime beyond the statutory maximum. *Apprendi*, 530 U.S.  
20 at 490, 120 S.Ct. 2348." 120 Wash. App., at 172.

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22 <sup>1</sup> This court recognizes the holding in *State v. J.H.*, 96 Wash.App. 167, 171 ,978 P.2d 1121, 1123 (1999) that  
23 juveniles are not entitled to jury trials. However, this analysis was undertaken prior to the *Apprendi*, *Jones v. U.S.*,  
*Blakely* and *Tighe* decisions and did not address the issue before this court as to whether such adjudications may  
be used to calculate an adult offender score.

1 In the instance of juvenile cases, there are no such jury determinations. Nor are there  
2 criminal convictions. (Compare R.C.W. 13.04.240 with R.C.W. 13.04.011.)

3 This Court does not question that it could make the factual determination of the  
4 existence of a prior juvenile adjudication. However, what is called into question is the legal  
5 determination regarding that adjudication. Unlike the prior conviction at issue in *Apprendi*, the  
6 instant adjudication may have received fair notice and a reasonable doubt standard, but did  
7 not receive “jury trial guarantees.” Absent this fundamental protection, the instant adjudication  
8 does not qualify under the *Apprendi* exception. The process adopted for juvenile adjudications  
9 may provide sufficient due process protection for the purpose for which it is employed, i.e.,  
10 rehabilitation, but the procedure falls short of the full panoply of rights required for purposes of  
11 sentencing enhancement as an adult.

12 If we wish to continue with the notion that the juvenile system is indeed separate and  
13 apart from the adult system – with different goals and different protections, indeed different  
14 terminology<sup>2</sup>, then it is unjust and unfair to allow juvenile adjudications to be treated as  
15 convictions for purposes of sentencing enhancements without the full panoply of rights  
16 afforded to adult defendants.

17 For the foregoing reasons, this court rules that that Mr. Tagaloa’s juvenile adjudication  
18 may not be counted as part of his adult offender score under the SRA because it violates the  
19 due process protections of the Sixth Amendment. A juvenile adjudication does not constitute a  
20 prior *conviction* under the *Apprendi* exception. The fact of a juvenile adjudication can not be  
21 used to increase the penalty for a crime beyond the prescribed statutory maximum because

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23 <sup>2</sup> In juvenile court, “defendants” are referred to as “respondents”; “convictions” are “adjudications”; and  
“sentencing” is “disposition.”

1 juveniles are not afforded trial by jury to make the determination which is later used to increase  
2 an offender score.

3 Dated this 15<sup>th</sup> day of April, 2005.

4 /s/  
5 John P. Erlick, Judge  
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